United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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74-1541

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United States Court of Appeals

FOR THE SECOND CIRCUIT

BREWER DRY DOCK COMPANY,
Plaintiff-Appellee,

against

SS MORMACLAKE, her engines, etc., and
MOORE-McCORMACK LINES, INC.,
Defendants-Appellants.

BRIEF OF PLAINTIFF-APPELLEE

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Cases Cited

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Statement

This appeals arises out of the entry of judgment for plaintiff in the amount of $52,308.00 for shipyard work, labor and services rendered to the SS MORMACLAKE in April, 1969. Defendant does not dispute that plaintiff is entitled to the reasonable value of it services except that it does deny that it should be charged for a certain portion of the work on the tailshaft. The repairs to the tailshaft were the focal point of the trial.

It cannot be seriously questioned that defendant made the decision to hand grind the liner area of the tailshaft (36a-37a). Although defendant claimed that it had hand ground tailshafts on prior and two subsequent occasions,

this method of repair was severely questioned by the vessel's chief engineer who testified that it was not good practice to hand grind the liner area (84a) and by defendant's surveyor who testified that a tailshaft cannot be hand ground without leaving some eccentricity (62a).

When the work was completed, the shaft was inspected by defendant's port engineer in charge of the work, a man with a chief engineer's license who was eminently qualified to handle anything that came along (67a). His function at the repair yard was to oversee the repairs and he had the authority to reject a repair item and say either do it over again or do it a different way (67a). Using a straight edge, defendant's port engineer checked the concentricity of the completed hand grinding before the shaft was returned to the ship (68a). If he had any real doubts as to the eccentricity of the liner, he could have taken the time to move the chain falls back so as to use the straight edge in perhaps 7 or 8 equal distant spaces around the shaft (68a). However, this was not done because he felt it was not needed (68a). He was also of the opinion that the liner could have lasted another three years (68a). It also appeared that said tailshaft was inspected and approved by both the United States Coast Guard and the American Bureau of Shipping (69a-70a).

POINT I

Moore-McCormack failed to sustain the burden of persuasion which upon the whole evidence remains with Moore-McCormack where it rested at the start.

It is defendant's contention that the trial court erred in imposing upon Moore-McCormack the burden of offering evidence that Brewer did its job in a careless, negligent or reckless manner, citing several bailment cases and

noting Brewer's failure to offer evidence with regard to the work.

The actual grinding was not work of an internal nature at all. It was observed by the first Moore-McCormack port engineer just before he left and he admitted that the work looked "all right" (38a). The replacement port engineer would only admit that he looked at the shaft when the grinding was finished (66a). He could have observed the work while under way but perhaps, in all fairness to him, there was really no reason to.

The actual work of hand grinding was visible to all. Watching the grinding under way was possible but would not have yielded any clues whatsoever. What was important was the condition of the shaft when the grinding was finished. The actual work, therefore, was obviously an insignificant step towards the all important completion of the work.

Defendant misreads the importance of the cases it cited. For example, the excerpt from *International Mercantile Marine S.S. Co.* v. *W. & A. Fletcher Co.*, quoted at page 7 of its brief. It is to be noted that the court speaks of redelivery of a chattel with marks of injury that only *culpable negligence* would probably cause. Culpable negligence has been defined by a Virginia court as "wanton or reckless conduct" *Krueger* v. *Taylor*, 132 Fed. 2d 736 (CA DC 1942). *In Re Ellman*, 48 Fed Supp. 518 (WDNY 1942), culpable was held to mean willful or malicious. Certainly it cannot be argued here that Brewer's work on the tailshaft resulted from culpable negligence.

Defendant also cites at page 8 of its brief *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104, 1941 AMC 1697. The following was set forth in that case on pages 110, 111:

> "The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence,

and in determining whether petitioner has sustained the burden the question often is, as in this case, what inferences of fact he may summon to his aid. In answering it in this, as in others where breach of duty is the issue, the law takes into account the relative opportunity of the parties to know the fact in issue and to account for the loss which it is alleged is due to the breach. Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee's liability, the law lays on him the duty to come forward with the information available to him. *The Northern Belle,* 76 U.S. 526, 529; *Gulf, C & S. F. Ry. Co.* v. *Ellis,* 54 Fed. 481, 483; *Pacific Coast S.S. Co.* v. *Bancroft-Whitney Co.,* 94 Fed. 180; The *Nordhvalen, supra.* If the bailee fails it leaves the trier of fact free to draw an inference unfavorable to him upon the bailor's establishing the unexplained failure to deliver the goods safely. *Southern Ry.* v. *Prescott,* supra; cf. *The America,* 174 Fed. 724.

Whether we label this permissible inference with the equivocal term 'presumption' or consider merely that it is a rational inference from the facts proven, it does no more than require the bailee, if he would avoid the inference, to go forward with evidence sufficient to persuade that the non-existence of the fact, which would otherwise be inferred, is as pro able as its existence. It does not cause the burden of proof to shift, and if the bailee does go forward with evidence enough to raise doubts as to the validity of the inference, which the trier of fact is unable to resolve, the bailor does not sustain the burden of persuasion which upon the whole evidence remains upon him where it rested at the start."

The relative opportunity of the parties to know the fact in issue was the same in this case, i.e. defendant was possessed of as much knowledge as Brewer with regard to the condition of the shaft. Brewer offered all available evidence involving the inspection and approval of the tailshaft including the fact that it was accepted without qualification by defendant's port engineer who was charged with overseeing all work. The question thus arises of what more could have been done before the shaft was returned to the ship. Defendant's surveyor was of the opinion that he could have determined that the liner area was not concentric at the time the hand grinding was finished (58a). Yet a highly-qualified port engineer not only checked by eye but with a straight edge which is precisely the method of checking recommended by said surveyor. There is nothing more that could have been done or offered for proof that would have enhanced the testimony adduced at the trial.

POINT II

The District Court correctly decided that the decision to hand grind the shaft was made with knowledge that risks were being incurred.

Defendant states that the only testimony which might be interpreted as attributing a risk to hand grinding a tailshaft liner was given by defendant's own surveyor. Yet, let us examine said testimony in detail. In response to a question by the court, the surveyor testified as follows (62a):

> " 'Q. In your opinion, can a tailshaft of the kind in question with a liner, can it be hand ground without some mark on the surface without leaving some eccentricity?

Let me state it another way:

Can a shaft of this kind be hand ground rather than machine ground?

A. In my opinion no, your Honor. In my opinion I think hand grinding is a very limited repair.

It can only do a little bit of it. You are asking for trouble if you go too far."

When we examine the surveyor's answer, a clear portend of danger emerges. In effect, the surveyor was asked two questions. Regardless, his answer whether attributable to either or both questions clearly defines the risks. His answer was, "In my opinion no, your Honor." He was therefore testifying (if answering the first question) that in his opinion a tailshaft of this kind with a liner cannot be hand ground without some mark of the surface without leaving some eccentricity. If it is defendant's own proof that no hand grinding can be accomplished without leaving some eccentricity, then the result as claimed by defendant was to be clearly expected. If the surveyor was answering the second question, he was testifying that a shaft of this kind cannot be hand ground rather than machine ground. If that is the case then defendant's own expert challenges the method of repair to the point that it could not have been done. It seems rather apparent that defendant's surveyor was answering both questions in the negative.

Defendant also dwells on the effect of its port engineer's approval of the work as said approval may bear on the alleged implied warranty of workmanlike performance. Only three cases were cited by defendant, the first of which was *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corporation* (1956), 350 U.S. 124. The three cases cited by defendant seem to have as their concur-

rent theme the claim against shipowner that it failed to discover or notice and correct a situation not created by shipowner. The point is that, in all cases, an attempt was made to implicate the shipowner and charge him with a duty which did not exist in the first place. In the *Ryan* case, supra, the contention was that the shipowner could have and therefore should have discovered improper stowage. In *Bethlehem Shipbuilding Corp.* v. *Gutradt Co.*, 10 Fed. 2nd 769 (C.A. 9th, 1926), the claim was more obvious. Since one defective valve was discovered by shipowner, it was argued that there arose on his part the obligation to assume that there were other defective valves which he should have discovered and corrected. In *Hill* v. *George Engine Corp.*, 190 Fed. Supp. 417, E.D. La., 1961, the third case cited, the Court rejected the contention that the shipowner could have but failed to discover a defective engine installation.

All three cases have as their principal point inaction on the part of shipowner which should have discovered and remedied a defect not of his own making. In the instant case, shipowner was involved to the point that it assumed direct control over every step in the chain of activity except the grinding, which was the most insignificant factor involved. The question presents itself as to what more Brewer could have done, or for that matter Moore-McCormack, to discover the alleged eccentricity. Moore-McCormack's own expert, the West Coast surveyor, testified that a shaft of this kind cannot be hand ground. It was, however, a choice dictated by Moore-McCormack.

Defendant's port engineer inspected and checked the liner with a straight edge. Again, the question presents itself as to what more could have been done? Employ another methor of checking? But Moore-McCormack's

other expert, the surveyor, said that checking with a straight edge was what he would have done. The testimony, therefore, was that the proper method of checking was utilized but that it apparently still did not indicate the alleged condition.

Again, it must be inquired what more Brewer could have done? Or Moore-McCormack? The port engineer was there for the express purpose of overseeing and passing the hand grinding, among other things. He was an expert and was there because he was. What additional duties could Brewer have undertaken if in fact, and the testimony confirming that is that of defendant, everything that should have been done was done.

Defendant's contention that its port engineer's inspection and approval had no effect on Brewer's alleged warranty raises the interesting question of why. Moore-McCormack is obviously suggesting that in spite of all available safeguards and accepted methods, a casualty did occur for which the ship repairer should respond. Clearly, the ship repairer must be an insurer, otherwise what other basis is there for liability? If everything that was supposed to be done was, in fact, done but a casualty occurred, there is no theory other than as an insurer to have the repairer respond.

But defendant offers no cases for this proposition. Defendant's cases suggest otherwise. In *Ryan,* supra, at page 134, the Supreme Court states that the stevedore's liability is for the performance of his obligation to stow in a *reasonably safe* manner (emphasis supplied). See also, *Garner* v. *Cities Services Tankers Corporation,* 456 Fed. 2nd 476 (C.A. 5th, 1972), where the duties were also characterized as to be exercised with reasonable safety. Reasonable safety does not mean absolute safety. Does Moore-McCormack suggest that the inspection and check-

ing at the conclusion of the grinding was not reasonably safe? Hardly, since the work was viewed by their own expert and the method of checking was approved by both of their experts.

In answer to the question as to where is the authority to hold Brewer liable, the answer is quite clear that there is none. The fact that defendant chose to ignore the later stevedore warranty cases, especially *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 78 S. Ct. 438, 2 L. Ed. 2nd 491 (1958), would seem to indicate that these cases are not helpful to defendant. They are, however, analogous to this situation and demand a dismissal of defendant's counterclaim.

In *Weyerhaeuser, supra,* the Supreme Court indicated that indemnification would, and should, be denied where the shipowner was guilty of *"conduct sufficient to preclude indemnity"* (italics supplied). If there had been on the part of some courts an inclination to vitiate this holding by construing it so rigidly as to be meaningless, such tendency was arrested by the language of the Supreme Court in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404, 89 S. Ct. 1144, 22 L. Ed. 2nd 371 (1969). There, the Supreme Court (Note 17) referred to the doctrine that the shipowner can be guilty of conduct which will preclude the recovery of indemnity even from a stevedore which has breached its warranty. In Note 18, the Court decided approvingly the decisions of lower courts holding that a shipowner owed an affirmative duty to stevedoring contractor to refrain from causing injury by *negligent* activity (italics supplied).

POINT III

Brewer is entitled to its repair bill in full.

Defendant is not appealing from that part of the District Court's decision which held that the reasonable value of Brewer's services was $52,308.00. It argues, however, that the charge of over $9,000.00, for work on the tailshaft should not be awarded. The proof was, however, that the fair and reasonable cost to effect the hand grinding of the liner or the work that was underlined on page 1 of the Brewer bill (71a) was between $300.00 to $350.00 (22a).

Defendant also suggests that the cause should be remanded with directions to assess Moore-McCormack's damages. Moore-McCormack was on the trial, as was plaintiff, required to prove its damages in full. There was no reservation of the issue of damages and no further proofs can be taken. Defendant rested on its counterclaim and its evidence must be limited to the proof adduced at the trial.

CONCLUSION

The judgment should be affirmed, with costs.

Respectfully, submitted,

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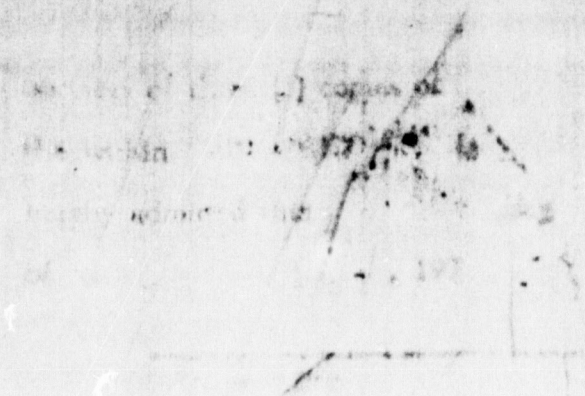

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